

ESTTA Tracking number: **ESTTA1186241**

Filing date: **01/24/2022**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91249427
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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

**EVOLUTIONARY GUIDANCE
MEDIA R&D INC.,**

Opposer,

v.

**CYBERMAN SECURITY, LLC AKA
THE CYBERHERO ADVENTURES:
DEFENDERS OF THE DIGITAL
UNIVERSE,**

Applicant.

Opposition No. 91249427

Serial No. 88219305

**Mark: THE CYBERHERO
ADVENTURES DEFENDERS OF THE
DIGITAL UNIVERSE**

Published: May 14, 2019

**OPPOSER EVOLUTIONARY GUIDANCE MEDIA R&D INC.'S,
COMBINED REBUTTAL BRIEF AND BRIEF AS DEFENDANT**

Opposer Evolutionary Guidance Media R&D Inc. (“Opposer”), by its undersigned counsel, submits its Reply Brief as Opposer in Opposition 91249427 and Brief as Defendant in Opposition 91253845.

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ARGUMENT

Evolutionary Guidance Media R&D, Inc.'s ("EGM" or "Opposer") has worked to establish brand awareness and distinctiveness in its registered CYBERHERO LEAGUE and common law CYBERHERO trademarks (collectively, "EGM's CYBERHERO LEAGUE and CYBERHERO marks") through its promotional activities for its interactive educational, entertainment, and social networking services.

EGM has opposed the application to register THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE ("Applicant's Mark") filed by Applicant Cyberman Security, LLC AKA The CyberHero Adventures: Defenders of the Digital Universe ("Applicant" or "Cyberman"). In response, Applicant has opposed EGM's application to register CYBERHERO for video games and toys on the basis of likelihood of confusion with Applicant's Mark and the assertion that Opposer's trademark CYBERHERO is generic.

As Opposer EGM's has established prior rights over Applicant through EGM's registration for CYBERHERO LEAGUE, Opposer asks the Board to sustain the opposition to Applicant's application to register THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE and dismiss Applicant's opposition to Opposer's application to register CYBERHERO.

I. OPPOSER HAS PRIORITY

EGM filed its intent-to-use based application for CYBERHERO on February 7, 2019 for use in conjunction with "downloadable video game programs; downloadable electronic game software for cellular telephones; downloadable computer game software via a global computer network and wireless devices" in Class 9 and "toys, namely game cards or tokens for use with downloadable video game programs; cases for play accessories; protective carrying cases specially adapted for hand-held video game systems; hand-held games with liquid crystal displays; hand-

held units for playing electronic game” in Class 28. EGM’s prior U.S. Registration No. 4197051 for CYBERHERO LEAGUE was cited in the CYBERHERO application.

EGM’s prior U.S. Registration No. 4197051 for CYBERHERO LEAGUE is for “interactive educational and entertainment services, namely, providing a web-based virtual educational theme-park featuring individuals, companies, and organizations engaged in charitable activities, which actively use the Internet to help other people, animals, or the environment” in Class 41, i.e., providing an in-person video game experience. EGM’s new application is for the home video game version of its current services provided, and therefore, is essentially identical to the offerings it had registered for use with CYBERHERO LEAGUE.

EGM’s prior CYBERHERO LEAGUE registration predates Applicant’s application for Applicant’s Mark. EGM has been using EGM’s CYBERHERO LEAGUE since 2011, which predates Applicant’s use of Applicant’s Mark by 7 years. As EGM owns an unchallenged registration for essentially the same goods covered by a mark similar to Applicant’s Mark, Applicant cannot be damaged by the registration of CYBERHERO. See *Missouri Silver Pages Directory Publishing Corp. Inc. v. Southwestern Bell Media, Inc.*, 6 USPQ2d 1028, 1030-31 (TTAB 1988). Cf. *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1711-12 (TTAB 2010), aff’d unpublished, No. 11-1052, 11-1053 (Fed. Cir. Nov. 9, 2011). Therefore, EGM respectfully requests that Applicant’s likelihood of confusion claims be dismissed.

II. OPPOSER’S MARKS ARE DISTINCTIVE

Opposer’s CYBERHERO Marks are not generic for Opposer’s downloadable video games and toys, namely game cards or tokens for use with downloadable video game programs (“Opposer’s Goods”).

A generic term “is the common descriptive name of a class of goods or services.” *Royal Crown Cola v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (quoting

H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term to be protected to refer to the genus of goods or services in question. *Royal Crown Cola*, 127 USPQ2d at 1046.

The Trademark Trial and Appeal Board follows the Federal Circuit’s two-part test in determining issues of genericness: First, what is the genus of goods or services at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus of goods or services? *Marvin Ginn*, 228 USPQ at 530. The relevant public’s perception is the chief consideration in determining whether a term is generic. See *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015). Evidence of the public’s understanding of a term may be obtained from “any competent source, such as consumer surveys, dictionaries, newspapers and other publications.” *Id.* at 1830. Applicant improperly applies the Marvin Ginn factors in its analysis of EGM’s CYBERHERO mark.

First, Applicant incorrectly identifies the genus at issue. The genus may be defined by the goods or services identified in the application. See *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (a proper genericness inquiry focuses on the identification set forth in the application or certificate of registration). Applicant improperly limits the genus to “online and internet related games and software *which are aimed at educating users of the games on cybersecurity and awareness.*” (emphasis added). The record does not support this limited genus. In this instance, the genus is “downloadable video game programs; downloadable electronic game software for cellular telephones; downloadable computer game software via a global computer network and wireless devices” in Class 9 and “toys, namely game cards or tokens for use with downloadable video game programs; cases for play accessories; protective carrying cases specially

adapted for hand-held video game systems; hand-held games with liquid crystal displays; hand-held units for playing electronic game” in Class 28.

Second, Applicant has failed to provide any evidence showing the relevant public – the purchasing public for the identified goods – understands CYBERHERO to refer to the genus - “downloadable video game programs; downloadable electronic game software for cellular telephones; downloadable computer game software via a global computer network and wireless devices” in Class 9 and “toys, namely game cards or tokens for use with downloadable video game programs; cases for play accessories; protective carrying cases specially adapted for hand-held video game systems; hand-held games with liquid crystal displays; hand-held units for playing electronic game” in Class 28. In the present case, the relevant public is children or parents of children purchasing video games and associated toys. Applicant does not provide any evidence of the relevant public discussing Opposer’s Goods or Opposer.

Instead, Applicant provides a few pages from the internet as purported evidence to establish the use of the terms “cyber hero” or “cyberhero” for other goods, namely graphic and adult-themed music albums. This evidence wholly does not support Applicant’s allegation that the term is common or that the term is used to refer to Opposer’s Goods.

The evidence of record does not support a finding that Opposer’s CYBERHERO mark is generic. Therefore, EGM respectfully requests that the Board dismiss Applicant’s opposition to EGM’s application to register CYBERHERO.

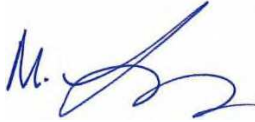
III. CONCLUSION

Based on the foregoing reasons and evidence of record, EGM respectfully requests that the Board sustain its opposition and refuse registration of the ‘305 Application for the mark CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE on the basis that the applied-for mark is likely to cause confusion with EGM’s CYBERHERO LEAGUE and

CYBERHERO marks. EGM further respectfully requests the Board dismiss the opposition of the
'133 Application for the mark CYBERHERO.

Respectfully submitted,

WRIGHT LINDSEY & JENNINGS LLP



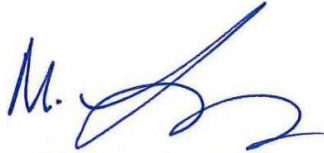
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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2022, copies of this paper are being served upon the following by email:

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